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No. 90-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES C. PLEDGER, COMMISSIONER OF REVENUES .... *Appellant*

vs.

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS .... *Appellees*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF ON THE MERITS BY APPELLANT

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QUESTION PRESENTED FOR REVIEW

WAS THE APPLICATION BY ACT 188 OF 1987 OF THE ARKANSAS GROSS RECEIPTS TAX TO THE SALE OF CABLE TELEVISION SERVICE VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THE TAX WAS NOT APPLIED TO THE SALE OF THE SERVICE OF UNSCRAMBLING SATELLITE TELEVISION SIGNALS?

LIST OF PARTIES

The parties to this proceeding are as follows: The Appellant is James C. Pledger, Commissioner of Revenues for the Arkansas Department of Finance and Administration. The Appellees are Daniel L. Medlock, a citizen of Pulaski County, Arkansas; Community Communications Company, an Arkansas corporation which operates six separate cable television systems in Arkansas; and the Arkansas Cable Television Association, Inc., a trade organization composed of 80 cable television systems operators in Arkansas. These Appellees, in a class action lawsuit, represent all similarly situated taxpayers. The following parties are also Respondents in this proceeding: Jimmie Lou Fisher, the State Treasurer of Arkansas; Donald Venhaus, the County Judge of Pulaski County, Arkansas; Patricia Tedford, the Treasurer of Pulaski County, Arkansas; Pulaski County, Arkansas; Joann Boone, the Treasurer of the City of Benton, Arkansas; and the City of Benton, Arkansas. These Respondents were sued along with all similarly situated counties and cities in Arkansas. The City of Fayetteville, Arkansas intervened in this lawsuit and is also a Respondent.

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OPINIONS DELIVERED BELOW

The Order and Judgment of the Chancery Court of Pulaski County, Arkansas, First Division, is unreported and is printed in its entirety at Appendix B of Petitioner's Petition for Writ of Certiorari herein. The Opinion upon which the Chancery Court Order and Judgment was based is printed in its entirety at Appendix C of Petitioner's Petition for Writ of Certiorari. The Opinion of the Supreme Court of Arkansas is reported at 301 Ark. 483, 785 S.W.2d 202 (1990), and is printed in its entirety at Appendix A of Petitioner's Petition for Writ of Certiorari.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The Opinion of the Supreme Court of Arkansas was delivered on February 28, 1990 (See Pet. App. A). The Petitioner timely filed a Petition for Rehearing, which was denied by Order of the Supreme Court of Arkansas on April 2, 1990 (See Pet. App. D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Act 188 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(D) (Supp. 1987) subjected to the Arkansas gross receipts tax sales of the following:

"Cable television services provided to subscribers or

users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

Act 769 of 1989, codified at Ark. Code Ann. § 26-52-501(3)(D)(i) (Supp. 1989), replaced Act 188 of 1987, and subjected to the Arkansas gross receipts tax sales of the following:

"Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services."

Ark. Code Ann. § 26-74-209(d) (1987) states:

"(d) If no election challenge is timely filed, there shall be levied, effective on the first day of the first calendar month subsequent to the expiration of the thirty-day challenge period, a one percent (1%) tax on the gross receipts from the sale at retail within the county of all items which are subject to the Arkansas Gross Receipts Act, § 26-52-101 et seq., and, in every county where the local sales and use tax has been adopted pursuant to the provisions of this subchapter, there is imposed an excise tax on the storage, use, or consumption within the county of tangible personal property purchased, leased, or

rented from any retailer outside the state after the effective date of the sales and use tax for storage, use, or other consumption in the county, at a rate of one percent (1%) of the sale price of the property or, in the case of leases or rentals, of the lease or rental price, the rate of the use tax to correspond to the rate of the sales tax portion of the tax. The use tax portion of the local sales and use tax shall be collected according to the terms of the Arkansas Compensating Tax Act, § 26-53-101 et seq."

Ark. Code Ann. § 26-75-207 (1987) states:

"(a) The governing body of any city may adopt an ordinance levying a local sales and use tax for the benefit of such city in accordance with the provision of this subchapter.

(b) The sales tax portion of any local sales and use tax adopted under this subchapter shall be levied by the governing body at the rate of one percent (1%) on the receipts from the sale at retail within the city of all items which are subject to taxation under the Arkansas Gross Receipts Act, § 26-52-101 et seq."

STATEMENT OF THE CASE

This case originated when Daniel Medlock, a cable television subscriber; Community Communications Company, an Arkansas corporation which operates cable television systems; and the Arkansas Cable Television Association, Inc., a trade organization composed of cable television operators in Arkansas, initiated a lawsuit in Pulaski County, Arkansas challenging the Arkansas Gross Receipts Tax on the sale of cable television service. Included as defendants in the lawsuit were James C. Pledger, Commissioner of Revenues for the State of Arkansas; Jimmie Lou Fisher, Treasurer of the State of Arkansas; Donald Venhaus, the County Judge for Pulaski County, Arkansas; Patricia Tedford, Treasurer of Pulaski County, Arkansas; Pulaski County, Arkansas; the City of Benton, Arkansas; Joann Boone, the Treasurer of Benton, Arkansas; and all other similarly situated counties and cities which passed a one percent local gross receipts tax under the provisions of Ark. Code Ann. §§ 26-74-209(d) (1987) and 26-75-207 (1987). The City of Fayetteville, Arkansas intervened in the case.

Act 188 of 1987, codified at Ark. Code Ann. § 26-52-301(3)(D) (Supp. 1987), subjected to the gross receipts tax the sale of cable television services provided to subscribers or users, including all service charges and rental charges whether for basic service or premium channels or other special service, and installation and repair service charges. The Plaintiffs in this case argued, in pertinent part, that this Act violated their rights of freedom of speech and freedom of the press guaranteed by the First Amendment to the United States Constitution. The Chancery Court of Pulaski County, Arkansas found that although cable television service was entitled to First Amendment protection, the taxation of such service in

and of itself was not violative of the First Amendment as long as the state does not treat similarly situated entities differently. The Chancery Court further found that cable television programming requires a cable system's use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media, justifying a different treatment for taxation purposes. (Petitioner App. C-10). As a result, the Chancery Court dismissed the Plaintiffs' Complaint. (Petitioner App. B-2). The Plaintiffs thereafter appealed this decision to the Supreme Court of Arkansas.

After the issuance of the Chancellor's order, Act 769 of 1989 was passed, which subjected the following sales to the Arkansas gross receipts tax:

> "Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services."

The Supreme Court of Arkansas held that because Act 188 of 1987 levied a tax on cable television enterprises, but did not tax the proceeds resulting from the "unscrambling" of satellite signals, which the court found to be a similar service, the Act violated the First Amendment to the United States Constitution. (Petitioner App. A-6). The Arkansas Supreme Court remanded the case to the Chancellor so that the taxes

collected under this Act could be refunded to those persons who paid them.

Both the Petitioner and the Respondents timely filed Petitions for Rehearing which were denied by the Supreme Court of Arkansas on April 2, 1990. (Petitioner App. D-1). This Court granted Petitioner's Petition for Writ of Certiorari on October 1, 1990.

SUMMARY OF ARGUMENT

THE APPLICATION BY ACT 188 OF 1987 OF THE ARKANSAS GROSS RECEIPTS TAX TO THE SALE OF CABLE TELEVISION SERVICE IS NOT VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

On February 28, 1990, the Supreme Court of Arkansas held that Act 188 of 1987, which imposed Arkansas Gross Receipts (Sales) Tax on the sale of cable television service, was in violation of the First Amendment to the United States Constitution because the tax was not levied on sales of other similar services such as the descrambling of satellite television signals. However, while past decisions of this Court have made it clear that cable television operators are entitled to First Amendment protection, it has also been made clear that this protection is not absolute.

This Court's decisions in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenues,* 460 U.S. 575 (1983); *City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986); and *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986), have dealt with similar First Amendment issues. These cases show us that the First Amendment will not allow a "singling out" of the press for differential tax treatment, but that the mere fact that a medium is entitled to First Amendment protections does not exempt the medium from all governmental regulation, such as taxation. This Court's decision in *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987) holds that such differential tax treatment cannot be based upon the content of a particular medium.

An analysis of Act 188 of 1987 in terms of the above cited cases shows that the Arkansas tax does not violate the First Amendment. Cable television is distinct from satellite television service and all other electronic broadcast media because it is the only medium that makes use of the public ways to provide its service. There is no "singling out" of the press in this case because the tax operates evenly on all cable television operators. Further, the tax does not discriminate upon the basis of content.

There are statements in the record of this case which indicate that the Arkansas General Assembly was not aware of a gross receipt producing satellite television service when Act 188 of 1987 was passed. This position is supported by the fact that the legislature passed Act 769 of 1989, which extended the tax to the sales of satellite descrambling services, at the earliest opportunity after the trial of this case. Without giving consideration to the fact that the legislature can only enact legislation with regard to what is known, the opinion of the Supreme Court of Arkansas places an impossible standard to follow in enacting non-discriminatory taxation legislation.

Based on the above arguments, this Court should reverse the judgment of the Supreme Court of Arkansas with regard to the constitutionality of Act 188 of 1987.

ARGUMENT

THE APPLICATION BY ACT 188 OF 1987 OF THE ARKANSAS GROSS RECEIPTS TAX TO THE SALE OF CABLE TELEVISION SERVICE IS NOT VIOLATIVE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

Past decisions of this Court have made it clear that cable television operators are entitled to First Amendment protection, but that this protection is not absolute. In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983), this Court expressly recognizes that a tax of general applicability which includes media companies does not fail constitutional scrutiny simply because the taxed entity engages in constitutionally protected activities, and that the First Amendment does not prohibit all regulation of the press or exempt the press from economic regulation.

In *Minneapolis Star*, this Court struck down as violative of the First Amendment a use tax on the cost of paper and ink used in publishing. Since paper and ink became the only items subject to the state's use tax, Minnesota's tax scheme singled out the press for special treatment. It was held that such "differential taxation of the press . . . places such a burden on the interests protected by the First Amendment" that it cannot be tolerated in the absence of a "counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (Id. at 585). It was concluded that an alternative means of achieving the same interest without raising First Amendment concerns existed. By taxing businesses generally, Minnesota could raise the necessary revenue while avoiding the censorial threat "implicit in a

tax that singles out the press." (Id. at 586). The tax was stricken because, without justification, it "singled out" the press. Further, it was held that the tax discriminated among members of the press, imposing liability only on large newspapers because of its exemption for papers of small circulation and was also invalid for that reason.

This point was also recognized in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), where this Court stated:

> "Of course, the conclusion that respondents' factual allegations implicate protected speech does not end the inquiry. Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." (90 L.Ed.2d at 487, 488).

This Court clarified its decision in *Minneapolis Star* in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986). In this case, the owners of an adult bookstore relied on *Minneapolis Star* to resist closure of their store in which prostitution and other illicit sexual activities had allegedly occurred. This Court rejected the bookstore's argument that *Minneapolis Star* applied, explaining that:

> "neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities . . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would

suggest that such liability gives rise to a valid First Amendment claim." (92 L.Ed.2d at 577).

In *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 95 L.Ed.2d 209, 107 S.Ct. 1722 (1987), this Court cited *Minneapolis Star* for the proposition that a "discriminatory tax on the press burdens rights protected by the First Amendment." (481 U.S. at 277). In this case, Arkansas generally imposed a tax on the gross receipts from sales of tangible personal property and exempted newspapers and religious, professional, trade, and sports journals from the tax. However, a similar exemption did not exist for other general interest magazines. The publisher of *Arkansas Times*, a general interest monthly magazine, challenged the constitutionality of the tax, claiming that while many First Amendment speakers were statutorily exempt, the *Arkansas Times* was taxed because of the nature of its speech.

This Court struck down the Arkansas tax as a "more disturbing use of selective taxation than *Minneapolis Star*," (Id. at 229) because the application of the Arkansas tax depended entirely on the content of each magazine. This Court stated:

> "In order to determine whether a magazine is subject to sales tax, Arkansas' 'enforcement authorities must necessarily examine the content of the message that is conveyed . . .' *FCC v. League of Women Voters of California*, 468 U.S. 364, 383, 82 L.Ed.2d 278, 104 S.Ct. 3106 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." (481 U.S. at 230).

An analysis of the present case in terms of the above cited cases shows that Act 188 of 1987 does not violate the First

Amendment protections guaranteed to the Respondents. As stated above, any governmental regulation can conceivably implicate the First Amendment, but such an implication does not automatically lead to a finding that First Amendment protections have been violated. Cable television is distinct from all other electronic broadcast media because, as was pointed out by the Chancellor in his opinion, cable is the only medium that makes physical use of the public ways to string its cable and to maintain and service the cable system. (Petitioner App. C-7). At the trial of this case, one of the Respondents' witnesses, Jim Guy Tucker, a limited partner in a cable company, stated:

> ". . . The franchise is granted to us by the particular governmental authority, and it is granted so that we have the right to be on public rights of way. Were it not for the need to utilize a public right of way, I do not believe any franchise would be required . . . But once you start crossing public streets and alleys and rights of way, you do. We are both on telephone poles . . . I say telephone, AP&L, First Electric Co-op, Southwest Bell. We are also buried in public rights of way, just as Storer, and this would be typical for all cable television companies." (Joint App. 79).

Therefore, cable television impacts upon and benefits from governmental property in ways that no other medium does. The United States Court of Appeals for the Eighth Circuit stated:

> "In its recent decision in *Los Angeles v. Preferred Communications, Inc.*, ___ U.S. ___ , 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), the Court suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the

cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order . . . Different communications media are treated differently for First Amendment purposes . . ." *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714, 715 (8th Cir. 1986).

The Eighth Circuit Court of Appeals adopted the reasoning of not only this Court, but also that of the United States Courts of Appeals for the Seventh and Tenth Circuits. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981).

The "singling out" of the press found to be defective by this Court in *Minneapolis Star* does not exist in the present case. As was pointed out by the Chancellor in this case:

> "No 'special' tax is involved in the case at bar, nor does the tax operate unevenly on cable television operators or services. The extension of Arkansas' general sales tax to charges for cable television service was not an attempt to single out a business entity claiming First Amendment protected rights. The general sales tax applies to sales of tangible personal property and a variety of sales of services." (Petitioner App. C-11).

Similarly, in *Arkansas Writers' Project*, supra, this Court found that the Arkansas sales tax scheme failed to survive First Amendment scrutiny because it afforded differential tax treatment based upon the *content* of certain publications. Act 188 of 1987 is applied evenly to all cable television operators, and does not discriminate upon the basis of content.

The Supreme Court of Arkansas dismisses the Chan-

cellor's finding that use of the public ways and disruption of public order make cable television distinctly dissimilar from all other media, stating that the above cited cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property. (Petitioner App. A-3). However, whether the complaint is made about a sales tax, a franchise fee, a franchise grant, or access regulations, it is still a complaint about government regulation. Therefore, this distinguishing feature of cable television justifies the differing tax treatment under Act 188 of 1987.

At Page 103 of Appellees' Abstract, the testimony of Gail Price, then Manager of the Sales and Use Tax Section of the Arkansas Department of Finance and Administration, is abstracted as follows:

> "About 8 or 10 years ago, I participated in meetings at the Revenue Department concerning the taxation of cable television services and it was considered in that framework to be a taxable service already within the law as it existed (R. 1008-1009). The Revenue Division waited for the legislature to change the Sales Tax law to add cable television as a designated taxable service, because we just considered it another service that was taxable and we decided to wait so that it would be clear that it would be included within the statute. There was never any indication or statement made that cable television was going to be singled out for special tax treatment, it was just another service they were trying to make taxable." (TR 1010) (Petitioner App. E-1).

Consequently, the General Assembly acted in the next legislative session after the trial and adopted Act 769 of 1989,

which extended the state and local sales tax to charges made for "scrambled" satellite broadcast television subscription services sold to an Arkansas citizen, further evidencing a lack of prior knowledge that a charge was collected with regard to satellite television service.

In this case, as in many, the constitutionality of an Act depends on the existence or non-existence of certain facts. If, for instance, a gross receipt producing satellite television service did not exist, then the Supreme Court of Arkansas would find Act 188 of 1987 constitutional since cable television has been found to be distinguishable from the print media. Act 188 was deemed unconstitutional only because satellite television is similarly situated to cable television in that both deliver essentially the same message and both have gross receipts for a sale of the service. The only difference between Act 188 of 1987 and Act 769 of 1989, which the Court found constitutional, is the added element of unscrambled satellite television.

The record indicates that the legislature was not aware of a gross receipt producing satellite television service when Act 188 was passed. When legislative findings of fact are relevant to a judicial determination, such findings are entitled to due respect. *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. *Re: Yun Quong*, 195 Cal. 508, 114 P. 835 (1911).

Cable and satellite television are rapidly growing and changing industries. Cable service of a general nature in Pulaski County was less than 10 years old when this lawsuit

was filed. It is certainly not unheard of for the government and the legislature to lag behind in developing regulation and taxation of new and rapidly developing industries. The legislature passed Act 188 of 1987 in reaction to the "new" cable television industry to collect a tax on a definable service. When the State "discovered" a gross receipt producing satellite television industry through testimony in this case, Act 769 of 1989 was passed. Surely it cannot be expected that the legislature will anticipate new industries before they are known to exist.

The Arkansas General Assembly acted at the earliest opportunity to correct what was suggested to be, but at the time not proven to be a difference in the tax treatment of two similar services, cable television service and satellite service.

It might be argued that lack of discriminatory intent on the part of the General Assembly should not be considered relevant as long as the resulting legislation has a discriminatory effect. In *Arkansas Writers' Project, Inc. v. Ragland*, supra, this Court stated:

> "Both types of discrimination can be established even where, as here, there is no evidence of an improper censorial motive . . . This is because selective taxation of the press — either singling out the press as a whole or targeting individual members of the press — poses a particular danger of abuse by the State." (95 L.Ed.2d at 219).

However, the issue argued here goes beyond merely whether the General Assembly had a discriminatory intent. Again, it is submitted that the relevant issue for purposes of this case is whether there was knowledge by the General Assembly that

another similar class of individuals to the class of taxpayers affected even existed at the time the Act was enacted.

Without giving consideration to the fact that the General Assembly can only enact legislation with regard to what is known, the opinion of the Supreme Court of Arkansas places an impossible standard to follow in enacting non-discriminatory taxation legislation. This decision would require the General Assembly to be clairvoyant with regard to the ever-advancing technology and competition in this and other scientific fields, so that such legislation will not be found in the future to be discriminatory as to classes of taxpayers which are suddenly placed in a situation which makes a previously dissimilar class of taxpayers similar.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse the judgment of the Supreme Court of Arkansas with regard to the constitutionality of Act 188 of 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Keadle, hereby certify that I have served true and correct copies of the above and foregoing Brief as provided by Supreme Court Rules 29.3 and 29.5(b) to each of the following, by U.S. Mail, postage prepaid, addressed as follows:

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